

Raffelo v Thompson Assets, LLC
2019 NY Slip Op 32979(U)
October 3, 2019
Supreme Court, New York County
Docket Number: 155811/2017
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTYPRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFMJustice

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INDEX NO. 155811/2017

SALVATORE RAFFELO, HELEN HANNAH

MOTION DATE 09/19/2019

Plaintiff,

MOTION SEQ. NO. 001

- V -

THOMPSON ASSETS, LLC,

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 61, 62

were read on this motion to/for

AMEND CAPTION/PLEADINGS

Plaintiff Salvatore Raffelo and Helen Hannah, tenants of 152 Thompson Street, New York, New York, Apartment A, which is owned by defendant Thompson Assets LLC, commenced this action seeking a mandatory injunction directing defendant to (1) register the apartment with the NYS Division of Housing and Community Renewal with the proper legal regulated rent and list plaintiffs as the rent stabilized tenants and (2) issue plaintiffs a rent stabilized renewal lease, and (3) for rent overcharge and treble damages. Defendant Thompson Assets now moves, pursuant to CPLR 3025 for leave to file an amended answer and counterclaims seeking a declaratory judgment that the apartment is not subject to rent stabilization, a judgment of eviction, a judgment for rent arrears and/or use and occupancy arrears due and owing from October 1, 2016 to date, and an order directing plaintiffs to pay use and occupancy for the apartment *pendente lite*. Plaintiffs oppose the motion and cross-move for partial summary judgment on the claims in the complaint.

Plaintiffs argue that defendant's proposed counterclaims are barred by res judicata and therefore lack merit. Plaintiffs' res judicata argument is based on a prior holdover proceeding commenced in 2016. In the proceeding, defendant-landlord alleged that the month-to-month oral lease of plaintiffs-tenants had expired and that the apartment was not subject to rent stabilization due to a high rent deregulation of the apartment. In the proceeding, defendant-landlord sought a judgment of eviction, a judgment for use and occupancy of the premises from October 1, 2016 until the date of possession, and attorneys' fees. Following the parties' cross-motions for summary judgment, the Civil Court, by decision dated April 17, 2017, dismissed the petition in that proceeding, finding that the defendant-landlord had failed to establish that it complied with the requirements of the Rent Stabilization Law and Rent Stabilization Code for permanently exempting an apartment from rent regulation based upon high rent vacancy deregulation.

Affirmation of Nina C. Oksman dated June 6, 2019, Exh. A. By order dated October 5, 2018, the Appellate Term affirmed the Civil Court's order, stating that "[t]he court's resolution of the coverage issue in tenant's favor and the resultant dismissal of the holdover petition was also proper, there being no showing that the subject apartment was properly deregulated." Oksman Aff., Ex. B. The Appellate Term also rejected the landlord's theory of a "first rent" deregulation based upon allegations that the prior owner changed the perimeters of the apartment since this theory was not alleged in the pleading and thus could not be raised in opposition to a motion for summary judgment. Oksman Aff., Exh. B.

"Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation. The rationale underlying this principle is that a party who has been

given a full and fair opportunity to litigate a claim should not be allowed to do so again.” *Matter of Hunter*, 4 N.Y.3d 260, 269 (2005). Further, “[w]here the same foundational facts serve as a predicate for each proceeding, differences in legal theory or relief sought do not create a separate cause of action. *Greaves v. Ortiz*, 65 A.D.3d 1085, 1085-86 (2d Dep’t 2009).

In the proposed affirmative defenses and first counterclaim, defendant-landlord seeks again to argue that the plaintiffs’ apartment is not subject to rent stabilization, this time based on the theory of a “first rent” deregulation for a newly constructed apartment. Defendant-landlord attempted to assert this theory in his cross-motion for summary judgment in the holdover proceeding and it was rejected by the Civil Court and then the Appellate Term because it was not pled in the petition. Defendant is precluded from asserting this claim in this action since the doctrine of res judicata applies “not only to claims actually litigated but also to claims that could have been raised in the prior litigation.” *Matter of Hunter*, 4 N.Y.3d at 269; 867-871 *Knickerbocker, LLC v. Martha C. Pol, et al.*, 2019 N.Y. Slip. Op. 51416(U) (App. Term 2d Dep’t 2019); *see also Jacob Marion LLC v. Jones*, 168 A.D.3d 1043, 1045 (2d Dep’t 2019). The defendant’s proposed second counterclaim which seeks a declaratory judgment that the base rent for the apartment should be set at \$2,795 also lacks merit since it is based on defendant’s theory that the “first rent” for the apartment was charged in 1999 and this argument is barred by res judicata.

Defendant’s proposed counterclaims for ejectment and unpaid rent are also completely devoid of merit. Given the Civil Court’s finding that the apartment is rent stabilized, there exists a landlord-tenant relationship between the parties. As such, Real Property Actions and Proceedings Law § 711 is applicable and it provides that no tenant may be removed from a housing accommodation except in a special proceeding. Under RPAPL 711(2), prior to

commencing a special proceeding based on non-payment of rent, defendant must serve plaintiffs with a rent demand, which defendant has not done. Accordingly, this branch of defendant's motion is denied. Likewise, defendant's demand for interim use and occupancy is denied with leave to renew at a nonpayment proceeding. *Jacob Marion, LLC v. Jones*, 168 A.D.3d 1043 (2d Dep't 2019).

With respect to plaintiffs' motion for partial summary judgment, the relief plaintiffs seek is premature given that the amount of legal regulated rent has not been determined. Accordingly, it is

ORDERED that the motion to amend and for use and occupancy is denied without prejudice to commencing a non-payment proceeding in Housing Court for the rent arrears; and it is further

ORDERED that plaintiffs' cross-motion for partial summary judgment is denied without prejudice; and it is further

ORDERED that the parties shall appear for a status conference on 10/24, 2019 at 9:30 a.m.

10/3/19

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN


PAUL A. GOETZ, J.S.C.

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

SUBMIT ORDER

REFERENCE

FIDUCIARY APPOINTMENT